IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CYNTHIA LYNN WOOD PLAINTIFF

V. NO. 3:97CV017-B-A

ALLSTATE INSURANCE COMPANY
AND THOMAS WHITE
DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the plaintiff's motion to remand and defendant White's motion to dismiss. The court has duly considered the parties' memoranda and is ready to rule.

I. Motion to Remand

This cause was removed on the basis of diversity jurisdiction. The notice of removal alleges that defendant White, a nondiverse insurance agent, was fraudulently joined. If fraudulently joined, White's citizenship is not considered in determining whether diversity of citizenship exists. Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 815 (5th Cir. 1993), cert. denied, 510 U.S. 868, 126 L. Ed. 2d 150 (1993). The removing party carries a heavy burden in establishing fraudulent joinder and must demonstrate it by clear and convincing evidence. Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). Fraudulent joinder may be established by showing outright fraud in the plaintiff's pleading of jurisdictional facts. Jernigan, 989 F.2d at 815; B., Inc., 663 F.2d at 549. In addition, "a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the

plaintiff that there was joint liability." Bolivar v. R & H Oil & Gas Co., 789 F. Supp. 1374, 1376-77 (S.D. Miss. 1991). Fraudulent joinder may also be established as follows:

> To prove their allegation of fraudulent joinder [removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against them in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992). The defendants contend that White, acting as an agent for a disclosed principal,[1] cannot be individually liable for the acts alleged in the complaint under Mississippi law. See McFarland v. Utica Fire Ins. Co., 814 F. Supp. 518 (S.D. Miss. 1992) ("where a defendant acts as an agent for a known principal, the general rule of Mississippi law is that the defendant-agent incurs no liability for a breach of duty or contract **committed by the principal**") (emphasis added), aff'd, 14 F.3d 55 (5th Cir. 1994). "**In the context of contractual duties**, the 'disclosed principal' rule does apply, and the agent does not incur personal liability to third parties for acts within the scope of his employment." Wheeler v. Frito-Lay, Inc., 743 F. Supp. 483, 486-87 (S.D. Miss. 1990) (emphasis added).

The defendants alternatively argue that even if the allegations amount to tortious conduct on the part of White, separate from Allstate's alleged breach of contract, White cannot be held individually liable for acts of simple negligence. Bass v. California Life Ins. Co ., 581 So. 2d 1087, 1090 (Miss. 1991). In Bass, the Mississippi Supreme Court adopted a standard of gross

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[1]It is undisputed that White exclusively sells insurance policies for defendant Allstate Insurance Company.

negligence or intentional tortious conduct to impose tort liability on "insurance company employees and/or agents **that are sued for their involvement in the denial of a claim for benefits**." Ironworks Unlimited v. Purvis, 798 F. Supp. 1261, 1265 (S.D. Miss. 1992) (analyzing Bass) (emphasis added). Under the general rule of tort law, an agent for a disclosed principal is subject to personal liability for his own tortious acts committed within the scope of his employment. Wheeler 743 F. Supp. at 487 (possible claim against employee-driver for negligent driving within the scope of employment). The Bass decision is limited to the tort-contract hybrid cause of action for bad faith denial of insurance claims. Dexter v. Moorman Manufacturing Co., Cause No. 1:97cv125-D-D (N.D. Miss. June 2, 1997). Accordingly, the court must review the allegations in the complaint in order to determine whether White is subject to liability under Mississippi law.

The plaintiff seeks contractual damages from Allstate and extra-contractual and punitive damages from both Allstate and White. This cause of action arises out of the plaintiff's injuries caused by an underinsured motorist. The complaint alleges that Allstate has not paid all the insurance proceeds to which the plaintiff is entitled under the uninsured motorist [UM] coverage of her auto policy. The plaintiff seeks to recover from Allstate contractual damages, limited to the lesser of actual compensatory damages or the stacked UM policy limits of $30,000, offset by the previously paid benefits. The plaintiff's request for extra-contractual and punitive damages from both Allstate and White is, in effect, based on an alternative claim that she was given unreasonable advise as to the amount of insurance she should purchase. The complaint further alleges that Allstate and White were grossly negligent in failing to advise the plaintiff in good faith as to her particular insurance needs "in all of their, and each of their dealings with her at all

relevant times."[2]

It is undisputed that Allstate issued to the plaintiff an auto insurance policy designating three autos as insured autos and providing $10,000 UM bodily injury coverage per person on each of the three insured autos. The endorsement in dispute subsequently amended the policy as follows:

> **Limits of Liability**
> The Uninsured Motorists Coverage -- Bodily injury limit stated on the declarations page is the maximum amount payable for this coverage by this policy for any one accident. This means the insuring of more than one auto for other coverages afforded by this policy will not increase **our** limit of liability beyond the amount shown on the declarations.
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> 1. Regardless of the number of insured autos under this coverage, the specific amount shown on the declarations is the maximum that **we** will pay under this policy....

The endorsement on its face precludes stacking.[3] The complaint alleges that the plaintiff is entitled to stack the UM coverage on all three autos totaling $30,000 under Mississippi law, regardless of the terms of the endorsement. The negligent motorist had a $10,000 limit on his personal injury liability insurance coverage and was therefore underinsured in light of the plaintiff's damages in excess of $10,000 and the aggregate UM limits under the plaintiff's policy.[4] The plaintiff has received $10,000 in liability coverage from the other motorist's insurer and

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[2]See Complaint, paragraph 30.

[3]Stacking is the practice of aggregating the limits of each vehicle covered under an insurance policy to compensate for damages sustained in an auto accident.

[4]Uninsured motorist coverage includes underinsured motorist coverage, applicable in this cause. Miss. Code Ann. § 83-11-103 defines the term "uninsured motor vehicle" to include [a]n insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage."

$7,000 of UM proceeds from Allstate.[5] Accordingly, the complaint seeks an additional $13,000 from Allstate for contractual damages. The complaint alleges that White represented that the insurance coverage provided in the policy issued to her would be adequate and that "White's representations were false in that the limits of coverage for uninsured motorist protection, and the limits of coverage for liability, were grossly inadequate...."[6] The claim against White is two-fold: (1) gross negligence in advising the plaintiff as to reasonable policy limits and (2) gross negligence in failing to advise the plaintiff of the effect of the above-quoted endorsement.[7]

The complaint does not allege any misconduct on the part of White with respect to the handling of the plaintiff's insurance claim, i.e., withholding of the remaining portion of UM proceeds allegedly due the plaintiff. The allegations as against White are based on the solicitation of the subject policy and the issuance of the endorsement prior to the auto accident giving rise to the subject claim. Therefore, the court finds that the Bass standard does not govern the claims against White.[8] Since White may be liable for torts he committed under the general tort law, the threshold issue is what duties, if any, White owed the plaintiff.

The defendants have moved to strike portions of the plaintiff's and Anse Dees' affidavits

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[5]Following the decision in Harrison v. Allstate Ins. Co., Cause No. 93-CA-01050-SCT (Miss. October 26, 1995), Allstate readjusted the plaintiff's claim to allow stacking of UM coverage on two insured autos to the extent of her damages, as calculated by Allstate.

[6]See Complaint, paragraph 8(f).

[7]The complaint alleges that Allstate and White failed to advise the plaintiff "as to the amount of liability and uninsured motorist coverage which was reasonably required for reasonable protection, and in Lynn's best interest" and to advise her to consider increasing her UM limits in light of the amendment or obtain insurance from another insurance company that allowed stacking. See Complaint, paragraphs 8(d) and 19.

[8]Accordingly, the court need not address whether the factual allegations would amount to gross negligence, as alleged.

filed in support of the motion to remand. The plaintiff's affidavit primarily reiterates the allegations of the complaint. Upon due consideration, the court finds that the following paragraphs of the plaintiff's affidavit contain legal conclusions and speculation and should be stricken: Paragraphs 6, 9-18.[9] Similarly, the following paragraphs of Anse Dees' affidavit contain legal conclusions and conjecture which are not the proper subject of an insurance agent's expert opinion and should be stricken: Paragraphs 4, 6, and 8-19.[10]

The complaint alleges

> Allstate and White owed Lynn the duty...to give good faith, and trustworthy, advice and counsel to Lynn concerning her real insurance needs, and to advise her concerning restrictions/exclusions/limitations contained in the insurance coverage which White and Allstate recommended....This requirement included the duty to recommend limits of coverage reasonably calculated to protect her from an occurrence reasonably foreseeable by Allstate and White....[11]

The Mississippi Supreme Court has stated:

> An insurance agent owes a duty to his principal to procure insurance policies with reasonable diligence and good faith. The duty owed is to provide the level of skill in procuring insurance reasonably expected of one in that profession.

Lovett v. Bradford, 676 So. 2d 893, 896 (Miss. 1996) (independent insurance agent held liable

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[9]The plaintiff's reliance on Lovett v. Bradford, 676 So. 2d 893, 895 (Miss. 1996) is misplaced. The court in Lovett held that expert testimony is not required to establish the standard of care in a "negligence case based on [the insurance agent's and the applicant's] discussion of [an] application for insurance -- a matter that a layman can understand based on common sense and practical experience." This decision does not allow a lay witness, such as the plaintiff, to testify as to legal conclusions.

[10]In addition, Dees' opinions are not a proper subject for expert testimony. As in Lovett, the instant claims against White do not involve "underwriting or actuarial tables or anything so complicated as to necessitate the testimony of an expert witness." 676 So. 2d at 895. See footnote 10, supra.

[11]See Complaint, paragraph 17.

for negligently completing insurance application, with respect to a previous fire loss) (quoting Taylor Machine Works, Inc. v. Great American Surplus Lines Ins. Co., 635 So. 2d 1357, 1362 (Miss. 1994) (possible claim of negligent procurement of insurance policy). This rule is derived from the standard applicable to independent insurance agents whose principal is the insurance applicant:

> An insurance agent owes the duty to his principal to exercise good faith and reasonable diligence to procure insurance on the best terms he can obtain, and any negligence or other breach of duty on his part which defeats the insurance he procures will render him liable for the resulting loss....[B]y holding himself out as being qualified to procure insurance, the agent is required...to have adequate knowledge **as to the different companies and the variety of terms available** with respect to the undertaking he has assumed.

First United Bank of Poplarville v. Reid, 612 So. 2d 1131, 1137 (Miss. 1992) (involving a "relationship between a lender acting as a credit life insurance agent and the customer/insured") (emphasis added), cited in Taylor Machine Works, Inc., 635 So. 2d at 1362. Unlike the independent insurance agents in the above-cited cases, White is an Allstate agent who sells Allstate policies exclusively. The complaint alleges that "White was at all relevant times acting as agent, servant, and employee of Allstate; and, Allstate is vicariously liable unto Lynn for the acts and omissions of White complained of herein."[12]

In any event, Miss. Code Ann. § 83-17-205 by its terms contemplates that the licensed agent will solicit insurance policies in good faith.[13] It is the scope of the agent's duty in soliciting

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[12]See Complaint, paragraph 8(b).

[13]Miss. Code Ann. § 83-17-205 provides in pertinent part:

> Before the issuance of a license or certificate of authority under the provisions of this article, the applicant...and the company or companies which the applicant proposes to represent shall file

insurance that is in issue. The plaintiff seeks to recover from White for recommending policy limits which proved to be inadequate for purposes of the subject insurance claim. The complaint alleges that the plaintiff reasonably relied on White's knowledge regarding her insurance needs. Similar allegations were addressed in an action in which the claim against the insurer was based on "negligent[] and/or intentional[] fail[ure] to adequately train its agents in the area of determining adequate policy limits and so advising its insureds":

> plaintiffs contend...that the State Farm agent responsible for "selecting" automobile insurance coverage for the Joiners negligently failed to advise and provide guidance to Alma Joiner concerning her insurance "needs," which resulted in the issuance of a policy that provided inadequate coverage....In other words, plaintiffs maintain that State Farm and its agents have a duty to recommend liability and uninsured motorist policy limits to applicants [footnote omitted]. No such cause of action exists in this state and there is absolutely no basis for predicting that such a cause of action would be recognized by the Mississippi Supreme Court.

Thomas v. State Farm Mut. Auto. Ins. Co., 796 F. Supp. 231, 237 (S.D. Miss. 1992) quoted in Aetna Cas. and Sur. Co. v. Berry, 669 So. 2d 56, 75-76 (Miss. 1996). The court in Berry held that, an insurance agent has the duty to explain the applicant's statutory rights and options, with respect to UM coverage. Under Mississippi law, "the minimum statutory amount any insurance policy must provide for in UM coverage, unless the named insured rejects UM coverage in writing, is $10,000.00." Aetna Cas. and Sur. Co. v. Berry, 669 So. 2d at 76 (citing Miss. Code Ann. §§ 83-11-101 and 63-15-31). Under Miss. Code Ann. §83-11-101, the insured has the option of rejecting UM coverage or purchasing more than $10,000 UM coverage up to the bodily

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> with the commissioner evidence...showing that the applicant is qualified, fit and trustworthy to act as an agent and to solicit the kind or kinds of insurance for which a license is requested; and the applicant shall submit evidence in such form as may be required by the commissioner of his intent to act in good faith as an agent....

injury liability limits of the particular policy. The court in Berry held:

> ...in order for an insured to have an option to increase UM limits not to exceed the limits of the policy, or for the insured to completely reject UM coverage in writing, an insurance agent has a duty to explain UM coverage as outlined above. An agent is not necessarily under a duty to **recommend** that the insured exercise the option of obtaining UM coverage up to the limits of the policy; however, before an insured may make an intelligent decision about how much UM coverage he wants, or make a knowing waiver of UM coverage in writing...he must understand what he is entitled to.

Id.

In Berry the insurance agent admitted that "he and Mr. Berry never discussed, and he never considered Mr. Berry's need for, UM coverage." Id. at 76-77. In this cause White discussed with the plaintiff and the plaintiff purchased the statutory minimum UM coverage. White allegedly recommended $10,000 UM coverage. The instant complaint does not allege that White failed to explain the option of purchasing UM coverage in excess of $10,000. Accordingly, the court finds that the complaint does not state a claim for breach of the duty recognized in Berry.

White owed no duty to recommend adequate policy limits under Mississippi law. In any event, the plaintiff alleges that her policy provided $30,000 for personal injury UM coverage at the time of the subject accident. If it is determined that the plaintiff is entitled to stack the $10,000 UM coverage on each of the plaintiff's three insured autos, the claim against White for recommending inadequate coverage will have no factual basis in that White will have secured the coverage to which the plaintiff claims to be entitled. Since Allstate did not attempt to preclude stacking until the policy was amended by an endorsement, White arguably contemplated UM

coverage for the plaintiff in an aggregate sum of $30,000 during his solicitation.[14] The plaintiff claims entitlement to insurance benefits totaling $30,000 and does not allege either that her damages exceed $30,000 or that recommending $30,000 UM coverage would have been unreasonable.

Without citing any authority, the plaintiff further alleges that both Allstate and White failed to explain the effect of the endorsement. Knowledge of unambiguous contents of an insurance policy, including any endorsement, is imputed to the insured, as a matter of law. Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) (this principle of contract law applies even if the insured has not read the policy). Since an amendment to an insurance policy is a matter between the contracting parties, separate and distinct from the solicitation thereof, the court finds no basis under Mississippi law for imposing personal liability on White for failing to explain the endorsement. Accordingly, the court need not address whether the language of the endorsement is ambiguous in determining the possibility of a claim against White.

For the foregoing reasons, the court finds that the allegations against him do not give rise to any possible liability on his part under state law and, thus White was fraudulently joined. Since diversity jurisdiction exists, the plaintiff's motion to remand should be denied.

The defendants have moved to dismiss the claims against White for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. "Taking the facts alleged in the complaint as true, if it appears certain that the plaintiff cannot prove any set of facts that would entitle it to the relief it seeks," dismissal is proper. C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir. 1995). As

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[14]Independent of the issue of stacking, as the defendants contend, since $10,000 is the statutory minimum, White's recommendation as to each auto was consistent with the legislative determination of the amount of coverage that is adequate and reasonable.

discussed, supra, the court finds that the complaint does not allege a breach of any duty White owed to the plaintiff. Accordingly, the defendants' motion to dismiss should be granted.

An order will issue accordingly.

THIS, the _____ day of September, 1997.

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NEAL B. BIGGERS, JR
UNITED STATES DISTRICT JUDGE